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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Cable Television Consumer	)	MM Docket No. 92-259
Protection and Competition	)	
Act of 1992	)	
	)	
Broadcast Signal	)	
Carriage Issues	)	

COMMENTS OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.

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SUMMARY

Time Warner Entertainment Company, L.P. ("Time Warner"), in its pending litigation, is challenging the constitutionality of various provisions of the Cable Television Consumer Protection and Competition Act of 1992, including the must-carry and retransmission consent provisions. Among other things, these provisions unconstitutionally compel Time Warner to speak in a manner that it might not otherwise choose, in violation of Time Warner's rights as a First Amendment speaker. In addition, the must-carry requirements seize, without adequate compensation, substantial portions of its facilities and transfer control of that capacity to other speakers in violation of the Takings Clause of the Fifth Amendment. Notwithstanding Time Warner's position regarding the unconstitutionality of any restrictions on its unfettered ability to carry only those broadcast signals which it chooses, within its editorial discretion, Time Warner nevertheless offers the following Comments to the Commission, as summarized below:

I. MUST-CARRY.

A. **Noncommercial Educational ("NCE") Stations.**

- Cable operators should have the right to designate the coordinates of the "principal headend" of each cable system.
- The Act does not require carriage of NCE stations which "substantially duplicate." This should be defined as 14 or more weekly prime time hours, the same definition as under the most recent must-carry rules.
- A cable system should be allowed to elect between the carriage of a qualified local NCE station and its translator, but should not be required to carry both.

- The FCC must decide whether noncommercial stations operating on commercial allocations qualify for NCE status on a case-by-case basis.

B. **Commercial Television Stations.**

- A cable system with facilities located in more than one ADI should be permitted to elect which ADI will apply for must-carry purposes. Many systems would find it technically impossible or prohibitively costly to carry different sets of must-carry stations on different portions of the same system.

- The FCC should liberally add or delete must-carry status for particular stations on particular systems, weighing the statutory factors, upon petition by the cable operator or affected station. Status quo should be maintained pending resolution of such petitions.

- ADIs should be frozen as of the effective date of the new rules. Otherwise, systems in "fringe" counties could be subjected to an ever shifting base of must-carry stations. Anomalies can be handled through the "add/delete" procedure.

- The FCC syndicated exclusivity and network nonduplication rules should be revised to assure that cable operators are not required to delete programming from the stations they are required to carry.

- No revisions to the rankings of the Top 100 markets are necessary to implement the must-carry or other requirements of the 1992 Cable Act. However, the FCC may want to add additional specified communities to existing television markets.

- As with NCE stations, local commercial stations which invoke must-carry status should be entitled to assert syndicated exclusivity and network nonduplication protection only against non-local commercial stations.

- Local commercial stations which elect retransmission consent should not be eligible for syndicated exclusivity or network nonduplication protection. By choosing retransmission consent, such stations are electing a free market approach rather than artificial regulatory protection. When stations elect to pursue free market negotiations, they can bargain for such protections directly with the cable system.

- The 1992 Act uses the terms "network" and "substantial duplication" for distinct purposes, and the FCC should adopt separate definitions which reflect such distinctions.

  -- "Network" should be defined in accordance with Sec. 73.662(i) of the rules.

  -- "Substantial Duplication" should be defined as 14 or more weekly prime time hours.

  -- Non-simultaneous programming must be considered as duplicative, just as it is under the syndicated exclusivity and network nonduplication rules.

C. **Manner of Carriage.**

- The FCC must establish a priority structure among the statutory options for channel positioning rights. Otherwise, a cable operator could face irreconcilable conflicts among stations demanding the same channel position, with the operator's requirement to establish a basic service tier in accordance with the 1992 Cable Act, or with pre-existing local franchise obligations.

- The FCC must recognize that a broadcast station delivering a signal which meets the signal strength criteria of the statute may, nevertheless, fail to deliver a "good quality" signal. Time Warner submits that the Commission should establish a definition of "good quality" in accordance with its recently revised cable technical standards.

- Cable operators should not have to incur additional costs or modify equipment in order to carry program-related material in the VBI.

- "Program-related" should be defined as material integrally related to the program, intended to be seen by the same viewers as are watching the program at the same time, the test developed by case law.

II. <u>RETRANSMISSION CONSENT</u>.

- The statute requires that retransmission consent apply to all multichannel video programming distributors, including DBS, SMATV, and MMDS.

- The legislative history of the 1992 Cable Act clarifies that retransmission consent applies only to commercial television broadcast stations, not to radio stations.

- Local commercial stations must make the same election between must carry or retransmission consent on a system-wide basis. The express language of the Act clearly indicates that retransmission consent provisions were intended to apply uniformly throughout a given cable system.

- Where cable systems serve communities located in more than one ADI, a station's must-carry election with respect to the local ADI portion of the system should automatically be deemed to grant retransmission consent as to any non-ADI community served by the system. Otherwise, it may be technically costly or legally impossible to continue carrying such stations in communities located outside the ADI.

- FCC rules must account for the tight timetables necessary for negotiating retransmission consent and implementing any signal line-up changes necessary to comply with the new must-carry and retransmission consent requirements. Accordingly, the FCC should require local commercial stations to elect between retransmission consent and must carry no later than May 1, 1993 and by May 1 every three years thereafter.

- The must-carry and retransmission consent requirements are so intertwined that they must be implemented on the same date, namely, October 6, 1993.

- The FCC should specify a default election procedure that will maintain the status quo in the absence of an affirmative must carry/retransmission consent election by local stations.

- Congress intended that the channels used for carriage of local retransmission consent stations be counted towards the maximum number of channels which cable operators are required to devote to the carriage of local television signals.

- Congress did not intend for manner of carriage and channel position rights to apply to stations electing retransmission consent.

- The FCC must implement retransmission consent requirements so as not to interfere with existing or future contractual rights of program producers and suppliers.

- The Commission should allow a reasonable time period for the negotiation of appropriate language governing retransmission consent in any programming contracts which are currently silent on such issue.

- Retransmission consent fees are a direct cost of providing basic cable service, and thus cable operators must be allowed to recoup the costs of retransmission consent fees.

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COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

Time Warner Entertainment Company, L.P. ("Time Warner"), hereby respectfully submits these Comments in response to the above-captioned Notice of Proposed Rule Making released by the Federal Communications Commission ("Commission") on November 19, 1992.[1] Time Warner is a partnership which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., a publicly traded Delaware corporation. Time Warner is comprised principally of three unincorporated divisions: Time Warner Cable, the second largest operator of cable television systems nationwide; Home Box Office, which operates pay television programming services; and Warner Bros.,

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[1] Notice of Proposed Rule Making in MM Docket 92-259, __ FCC Rcd __, adopted November 5, 1992 ("NPRM").

which is a major producer of theatrical motion pictures and television programs.

In pending litigation, Time Warner Entertainment Company, L.P. v. FCC, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992), Time Warner is challenging the constitutionality of various provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or "Act"),[2] including the must-carry and retransmission consent provisions (Sections 4, 5 & 6 of the 1992 Cable Act). Among other things, these provisions unconstitutionally compel Time Warner to speak in a manner that it might not otherwise choose, in violation of Time Warner's rights as a First Amendment speaker. In addition, the must carry requirements seize, without adequate compensation, substantial portions of its facilities (typically more than 30% of the channel capacity of Time Warner cable systems) and transfer control of that capacity to other speakers, in violation of the Takings Clause of the Fifth Amendment. In submitting these comments, Time Warner specifically reserves, and does not waive, its constitutional rights, and these Comments are filed without prejudice to Time Warner's constitutional challenges.

Notwithstanding Time Warner's position regarding the unconstitutionality of any restrictions on its unfettered ability to carry only those broadcast signals which, within its editorial discretion, it chooses to carry, Time Warner

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[2]Pub.L. No. 102-385, 106 Stat. 1460 (1992).

nevertheless offers the following Comments in response to the NPRM.

I. MUST-CARRY REGULATIONS.

A. Carriage of Local Non-Commercial Educational Television Stations.

The 1992 Cable Act requires the carriage of certain non-commercial educational television ("NCE") stations. Because a separate effective date for this section was not provided in the Act, the Commission assumed that the statutory must-carry requirements for NCE stations became effective on December 4, 1992, the effective date of the Act.[3] However, the Commission correctly recognizes that there are a number of issues which need to be resolved in the implementation of carriage requirements for NCE stations.[4] The Standstill Agreement recently concluded by the parties to the various challenges to the must-carry provisions of the Act will afford the Commission, the affected cable operators and NCE stations an opportunity to sort out the issues arising under the must-carry provisions in a timely fashion.[5] Time Warner herein expresses its views on a number of the issues which the Commission has raised in its NPRM.

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[3]Self-Effectuating Provisions of the Cable Television Consumer Protection and Competition Act of 1992, FCC Pub. Notice DA92-1526 (Nov. 5, 1992); NPRM at ¶6.

[4]NPRM at ¶¶9-14.

[5]Turner Broadcasting System, Inc. v. FCC, Civ. No. 92-2247 (D.D.C. Dec. 4, 1992).

1. Qualified Local NCE Stations.

In footnote 5 of the NPRM, the Commission notes that the NCE carriage obligations generally do not conflict with existing rule requirements. The one exception to this noted by the Commission involves the network non-duplication rights of NCE stations. Thus, the Commission stated that, as between qualified local NCE stations, the rules will be revised to provide that no network non-duplication requirements will be enforced.[6] Time Warner submits that there is one additional parity situation which requires attention. The 1992 Cable Act states that cable systems must continue to carry all qualified local NCE stations that were being carried as of March 29, 1990. If such stations substantially duplicate other must-carry NCE stations, the Commission should clarify that the cable operator should have the same discretion as to which station to carry as the Act provides with regard to other substantially duplicating qualified local NCE stations.[7] In addition, the provisions of the Act which condition a cable operator's carriage of a local NCE station should both be applicable, i.e., the station must compensate the cable

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[6]NPRM at ¶7, n.5.

[7]See Pub.L. No. 102-385, 106 Stat. 1460 at §5 (1992), to be codified, in part, at 47 U.S.C. §535(b)(3)(B), (e) (hereinafter "Section 615", referring to the fact that §5 amends the Communications Act of 1934 by adding a Section 615 to Part II of Title VI of that Act).

operator for any additional copyright liability and deliver a signal of adequate quality to the cable system.[8]

A cable operator should be allowed the flexibility to fulfill its obligation to carry a particular qualified local NCE station by carrying a translator of that station where, for example, the translator provides a better quality signal to the cable operator's principal headend. Under no circumstances, however, should a cable system be required to carry both an NCE translator and its parent.[9]

Finally, the Commission has requested comment on whether NCE-type stations which operate on commercial channel allocations should ever be considered qualified NCE stations.[10] Time Warner believes that NCE status should not be automatic for such stations, but instead should be subject to a petition by the station and ad hoc determination by the Commission, applying the standards of Section 73.621 of the Commission's rules. In creating a definition for "qualified" NCE stations, the 1992 Cable Act clearly recognizes that not all noncommercial stations are qualified NCE stations. For example, noncommercial "specialty" stations might not qualify as NCE stations. Thus, the mere fact that a station has been granted authority to operate on a noncommercial basis on a commercial allocation does not mean that such a station should

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[8]Section 615(g)(4), (i)(2).

[9]See 47 C.F.R. §76.55(c) (1972) (deleted).

[10]NPRM at ¶8.

be deemed a qualified NCE station for must-carry purposes. Rather, the Commission should make ad hoc determinations, consistent with the statutory directive in Section 615(l)(1)(B)(III) of the Act.

2. Principal Headend.

Must-carry status is granted to a qualified NCE station if the reference point of the qualified NCE station's community of license is within 50 miles of the principal headend of the cable system, or if the station's grade B service contour covers the principal headend of the cable system.[11] Moreover, a "good quality" signal must be delivered to the principal headend to maintain must-carry status.[12] Thus, the location and definition of the term "principal headend," which is not defined in the Act, is a crucial issue for making the determination of whether a qualified NCE station must be carried.

The Commission correctly proposes to permit cable operators to specify the location of their own principal headends.[13] As the Commission knows, many cable systems have multiple headend facilities which may be interconnected, e.g., via fiber, coaxial supertrunk or microwave. It is not always apparent which of the signal processing centers in a single technically integrated multiple hub cable system is the

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[11]Section 615(l)(2)(B).

[12]Section 615(g)(4).

[13]NPRM at ¶8.

"principal headend." The cable operator is in the best position to make this determination. The designation of a cable operator's principal headend could be included on an amended Form 320 which would require each system to note the coordinates of its chosen principal headend. The location of a system's principal headend should be permitted to be changed upon a reconfiguration of the cable system by the cable operator. This could happen, for example, as a result of a cable system rebuild, or when a cable system acquires an abutting cable system, or if headend facilities are consolidated through interconnection.

Finally, with regard to the Commission's question as to the need for additional reference points in Section 76.53 of the Commission's rules,[14] Time Warner believes that it would be helpful to supply the coordinates for every community where a full power NCE station is allocated. This may require the addition of some communities and reference points to Section 76.53, but would assist in resolving certain must-carry issues without Commission intervention.

3. Signal Carriage Obligations.

The Commission notes that it must define when programming is "substantially duplicated" for purposes of the medium-capacity system exception regarding state educational networks (Section 615(b)(3)(C)) and for large-capacity systems (Section

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[14]NPRM at ¶8.

615(e)).[15] Time Warner submits that the definition should be the same for both purposes. There is no rational basis to have different definitions and the use of different definitions would only cause confusion. It seems clear that Congress intended for "substantially duplicated" to be a less demanding standard than "predominantly," which is used in the definition of a municipal NCE station, and for which a 50% test is suggested.[16] Therefore, a requirement of 50% duplication, which is taken from Section 76.33(a)(2) of the Commission's rules, would be excessive to meet the "substantial duplication" test. In its place, Time Warner suggests that substantial duplication should be defined as 14 weekly prime time hours, the definition used in the Commission's former must-carry rules.[17]

In addition, the Commission should make clear that the duplication should not have to be simultaneous for must-carry purposes. Although the Commission required simultaneous duplication for purposes of determining the number of available stations under its pre-1992 Cable Act effective competition standard, it is clear that a station which duplicates the programming of another station even on a non-simultaneous basis represents a reduction in the diversity of programming provided

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[15]NPRM at ¶12.

[16]H.R. Rep. No. 628, 102d Cong., 2d Sess. 104 (1992) ("House Report").

[17]47 C.F.R. §76.5(j) (1984) (deleted).

to subscribers if that station is allowed to assert must-carry rights and be carried in place of a cable program service which may have little or no duplication. Simply put, whether or not the "simultaneous" duplication requirement is appropriate in the context of determining whether rate regulation is necessary, it is actually counterproductive in a signal carriage context. Indeed, in reinstituting syndicated exclusivity rules and revising the network nonduplication rules, the Commission expressly took the position that non-simultaneous programming is deemed to be "duplicating."[18]

4. Procedural Issues.

The Commission raises certain procedural questions in paragraph 14 of the NPRM. In particular, the Commission inquires as to the procedures to be used by a cable operator to identify those NCE stations being carried in fulfillment of must-carry obligations. Time Warner submits that NCE stations carried pursuant to the must-carry rules should be identified pursuant to the same procedures as those used for commercial stations. Requiring cable operators to maintain a list of must-carry stations carried in the public file is overly broad and creates unnecessary paperwork burdens. Section 615(k) merely requires that NCE signals carried in fulfillment of a cable operator's must-carry obligations be disclosed "upon request." It is reasonable to assume that the only party

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[18]Report and Order in Gen. Docket No. 87-24, 3 FCC Rcd 5299 (1988) at ¶118.

likely to make such a request is an NCE station which is denied carriage. If carriage is denied because the cable operator has already filled its "quota" of NCE stations, the operator would obviously disclose the qualified local NCE stations already being carried in response to the relevant carriage request from the NCE station. If still not satisfied, Congress has provided a dispute resolution mechanism in Section 615(j). There is no need for further regulatory embellishment by the Commission of the carriage disclosure requirement contained in Section 615(k) of the Act.

As a final matter relating to carriage of NCE stations, the Commission should reiterate that any cable system is free to carry any additional NCE stations it chooses, above and beyond any must-carry obligations. As to systems with 12 or fewer channels[19] or with 13 to 36 channels[20] the Act specifically gives cable operators discretion to carry additional local or non-local NCE stations. However, Congress inadvertently failed to include such language in the provisions applicable to systems with more than 36 channels. However, by expressly excluding NCE stations from the retransmission consent requirement[21] and by adopting the unambiguous policy, directly applicable to systems with more than 36 channels, to

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[19]Section 615(b)(2)(A).

[20]Section 615(b)(3)(A)(ii).

[21]Pub.L. No. 102-385, 106 Stat. 1460, at §6 (1992), to be codified, in part, at 47 U.S.C. §325(b)(2)(A) (hereinafter "Section 325").

"promot[e] access to distinctive noncommercial educational television services"[22] it is evident that Congress did not intend to preclude any cable operator from voluntarily carrying additional NCE stations, whether local or non-local.

B. Carriage of Local Commercial Television Stations.

1. Broadcast Television Market Definition.

Unlike the Grade B contour or 50-mile zone used in Section 615 to define "local" NCE stations for must-carry purposes, Section 4 of the Act[23] refers to a section of the Commission's rules which incorporates Arbitron's Area of Dominant Influence ("ADI") for commercial television station must-carry purposes.[24] Under that definition, every county in the contiguous United States is assigned to only one ADI. These assignments are based on the shares of the county's total estimated television viewing hours as surveyed by Arbitron, a private audience research firm. Each ADI consists of those counties where the "home" stations receive a preponderance of the viewing. As the Commission notes, some ADIs may be as small as one county, while other ADIs are very large. Moreover, ADIs are sometimes influenced by cable carriage of

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[22]Section 615(e).

[23]Pub.L. No. 102-385, 106 Stat. 1460, at §4 (1992), to be codified at 47 U.S.C. §534 (hereinafter "Section 614," referring to the fact that §4 amends the Communications Act of 1934 by adding a Section 614 to Part II of Title VI of that Act).

[24]Section 614(h)(1)(C).

signals in distant counties where the signals could not be received off the air.[25]

Although changes in ADIs are adopted on an annual basis by Arbitron, Time Warner submits that the Commission's regulatory scheme requires considerably more certainty. ADI markets should be frozen for Commission purposes, i.e., the most current ADI listing as of the date the rules are adopted should be used. To allow changes to be made every time Arbitron shifts a county from one ADI to another would create a chaotic situation for cable systems located in those counties. It also would put the signal carriage obligations of regulated cable systems in the hands of a private audience survey firm which makes ADI changes for reasons having nothing to do with cable signal carriage rules. As the Commission correctly noted when it first adopted television market categories based on Arbitron data in 1972:

> The list will not be revised each time new rankings are issued; there must be stability in this area, so that plans and investment can go forward with confidence. A contrary approach would be disruptive to the viewing public.[26]

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[25]NPRM at ¶18, n.20.

[26]Cable Television Report and Order, 36 FCC 2d 143 (1972) at ¶ 75. Indeed, the same considerations underpin the Commission's long established policy of not removing stations from its list of significantly viewed signals. See, e.g., KCST-TV, Inc., 103 FCC 2d 407 (1986).

2. Location of a Cable System.

The location of a cable system's principal headend is important to the must-carry rules for commercial stations in that the Act requires a "good quality" signal to be delivered to a cable system's principal headend in order to qualify for must-carry status.[27] As stated above in addressing the NCE rules, the cable operator should be charged with the obligation of identifying the location of its principal headend.

The Commission correctly notes that a technically-integrated cable system serving multiple communities may extend into more than one ADI. In situations where such an integrated cable system in fact serves communities in more than one ADI, the cable system should be considered located within only one ADI. The adoption by Congress of the ADI definition at least has the advantage that every county in the contiguous United States is in one, and only one, ADI. Similarly, every commercial television station is assigned to one, and only one, ADI. To maintain the integrity of this approach, every cable system must be located within one, and only one, ADI.

A contrary interpretation would lead to anomalous results to the detriment of consumers. First of all, the Commission must realize that for technically-integrated cable systems, it is virtually impossible to carry one set of signals in one group of communities and another set of signals in other communities. Indeed, to accomplish such inconsistent channel

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[27]Section 615(g)(4).

lineups, it is typically necessary to construct separate headend facilities for each system segment, which essentially destroys the economies and other advantages behind creating a technically-integrated system in the first place. Beyond the technical limitations, inconsistent channel lineups create unnecessary marketing problems and consumer confusion. Moreover, offering a consistent lineup of must-carry broadcast signals system-wide will become particularly important under the 1992 Cable Act given the emphasis on the rates charged for this mandatory level of basic service.[28]

If a cable system is deemed to be in more than one ADI, it will in all likelihood have to carry all commercial stations from each ADI in all of the communities served by the system. This will result in a greater number of systems which are required to devote their entire channel maximum to satisfy must-carry requirements,[29] further restraining the operator's editorial discretion and, depending on the system's capacity, displacement of non-broadcast cable networks which may be more desirable to consumers. Moreover, it may be difficult for a cable operator to carry all signals from several ADIs. Obviously, a station electing must-carry may be carried by a cable operator to all communities within that station's ADI. If certain communities served by the system are outside the station's ADI, however, the station can only be carried in

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[28]See Section 623 of the Act, as amended.

[29]Section 614(b).

those communities pursuant to retransmission consent.[30] Due to contractual limitations, the station may be precluded from granting retransmission consent outside of its ADI. Accordingly, it is critical that no technically-integrated cable system be deemed to be located in more than one ADI.

Therefore, in multiple ADI situations the cable operator should be free to choose the ADI in which it will be considered located under a reasonable choice standard.[31] If this choice is contested, the location of either the system's principal headend or center of system coordinates (as reported to the FCC pursuant to Section 76.615(b)(5) of the rules) in the chosen ADI should be considered prima facie evidence of a reasonable choice by the cable operator. Any remaining anomalies can be dealt with through the broadcast market adjustment procedures addressed in paragraphs 18 through 20 of the NPRM, as more fully discussed below.

3. Adjustments to Must-Carry Status.

Time Warner agrees that there will sometimes be valid regulatory reasons to add or delete various communities from the local market of a particular television station for must-carry purposes. These reasons should be advanced by a cable

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[30]See Section 325(b).

[31]Because of the May 1, 1993, initial election date advocated by Time Warner, Time Warner would have no objection to requiring cable operators to identify the ADI in which their systems are located within a reasonably prompt period of time after the Commission's release of its rules in this docket in order to provide commercial stations with a sufficient opportunity to make their must-carry/retransmission consent election.

operator or a television broadcast station in a petition for special relief, pursuant to the procedures contemplated by Congress in Section 614(h)(1)(C). Time Warner believes that such determinations should only be changed by the special relief process once the Commission's rules have been placed into effect. Meanwhile, as the Act states, the status quo should be maintained pending the resolution of any request for such an adjustment. The only exception to this rule would be where the cable operator and the directly affected broadcast station are in agreement over the relief requested in the petition. In that case, the relief asked for could be conditionally implemented pending Commission action on the request.

In paragraph 20 of the NPRM, the Commission seeks comment on whether the criteria for broadcast market adjustment petitions set forth in Section 614(h)(1)(C) should be supplemented. In particular, the Commission raises a question regarding the usefulness of a specific mileage zone. Time Warner believes that a mileage zone does not necessarily indicate a station's actual relationship to the communities served by a particular cable system. A principal theme of the statutory criteria is a community of interest between the station and the cable system's communities. The viewability of the signal would seem to be more relevant to this theme than a mileage zone. Time Warner therefore suggests that the Commission supplement the fourth statutory criterion ("viewing

patterns" in the cable community) by using the presence of either the station's predicted Grade B service contour or significantly viewed status pursuant to Section 76.54 of the rules as further indicia of the local nature of a station.[32]

Similarly, in carrying out Congress' mandate pursuant to Section 614(h)(1)(C), the Commission should pay particular attention to the desires and interests of viewers located in a particular community, given the ostensibly overriding goal of the 1992 Cable Act to place the interests of consumers above the private economic interests of cable operators or broadcasters. For example, a cable system located in state X might be located in the ADI of a market centered in state Y, but the subscribers to that system might have a greater community of interest with stations licensed to a community in state X. Under such circumstances, broadcast market adjustments should be liberally granted.[33]

Any change in a station's market determination should not require the displacement of existing services in order to accommodate new must-carry stations. As is the case elsewhere

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[32]Given that Congress has specified an ADI standard based on viewing patterns in both non-cable and cable homes, the Commission may wish to make appropriate changes so that the significantly-viewed test is consistent for purposes of broadcast market adjustments, or perhaps specify a significant viewing standard exclusively for broadcast market purposes.

[33]This requires a departure from those cases wherein the Commission refused to grant syndex and nonduplication waivers in similar circumstances. See King Videocable Co., 6 FCC Rcd 2218 (1991); Cox Cable Humboldt, Inc., 6 FCC Rcd 6845 (1991).

in the must-carry requirements,[34] such stations would be given priority for the first available channel on the basic tier, i.e., triggered by the expansion of a system's channel capacity or reconfiguration of services. Finally, if a station achieves must-carry status on a cable system via the special relief process, Time Warner submits that it should be treated exactly like a "local" station, i.e., it should not be subject to non-duplication or syndicated exclusivity requests by other local stations and the cable system should be able to invoke the substantial duplication standard in its carriage decision.

4. Market List Changes.

As the Commission notes in paragraph 21 of the NPRM, the 1992 Cable Act indicates that the Commission should make "necessary revisions" to Section 76.51 of the Commission's rules, the list of the largest 100 television markets together with their designated communities. No revision to this list is needed to implement the must-carry rules since the current ADI markets are to be used for determining must-carry rights, and no distinctions based on broadcast market rank are employed, unlike prior FCC rules relating to broadcast carriage. As the Commission notes, if the broadcast market rankings are altered, this could affect cable operators' copyright liability pursuant to Section 111 of the Copyright Act of 1976, a matter which is outside the Commission's jurisdiction. Thus, Time Warner submits that, since it is not "necessary" for the rankings

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[34]Section 615(b)(2)(B)(iii).